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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/694,521	10/23/2000	George Frey	4002-2512	9645

7590

10/31/2003

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EXAMINER

PRIDDY, MICHAEL B

ART UNIT

PAPER NUMBER

3732

DATE MAILED: 10/31/2003

121

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

09/694,521

Applicant(s)

FREY ET AL.

Examiner

Michael B Priddy

Art Unit

3732

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 39-45 and 50-85 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) 39-45 is/are allowed.
- 6) ☐ Claim(s) 50, 51, 53-57, 62-64, 66, 67, 69, 73, 74, 78, 83 and 84 is/are rejected.
- 7) ☐ Claim(s) 52, 58-61, 65, 68, 70-72, 75-77, 79-82 and 85 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 4-7 & 9
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

Art Unit: 3732

## **DETAILED ACTION**

### ***Election/Restrictions***

Applicant's election without traverse of Group IV, species E (Figs. 37 and 39) in Paper No. 11 is acknowledged. An action on the merits of claims 39-45 and 50-85 follows.

### ***Claim Objections***

Claims 60 and 61 are objected to because of the following informalities: in line 2 of claim 60, the first occurrence of "includes placing" should be deleted. Appropriate correction is required.

Claims 80 and 81 are objected to because of the following informalities: in line 2 of claim 80, one occurrence of "includes placing" should be deleted. Appropriate correction is required.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

Art Unit: 3732

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) and the Intellectual Property and High Technology Technical Amendments Act of 2002 do not apply when the reference is a U.S. patent resulting directly or indirectly from an international application filed before November 29, 2000. Therefore, the prior art date of the reference is determined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

Claims 50, 51, 53-57, 62-64, 66, 67, 69, 73, 74, 78, 83 and 84 are rejected under 35 U.S.C. 102(e) as being anticipated by Stone et al. (U.S. 6,387,130). Stone et al. teaches a segmented linked intervertebral implant system and a method for installing said system. Fig. 9 illustrates a method of inserting the segmented implant system 10 in which an elongated member 30 is operated through a cannula 60 which has been inserted through a posterior lateral opening into the disc space. Implant segments 20A-20D are engaged by elongated member 30 via through-holes 21 and may be pushed together by contacting the each trailing end with positioning tool 70 until the segments 20A-20D abut one another in a curved shaped intervertebral assembly 10. As segments 20A-20D are pushed into the intervertebral space, they pivot due to the curvature of the distal end of elongated member 30.

As shown in Fig. 1, the implanted assembly 10 includes a convexly curved wall and an opposite concavely curved wall and the convexly curved wall is anteriorly oriented. When only three segments are used, the center segment 20B is positioned such that its leading end is on a side of the spinal column axis opposite the opening and its trailing end is positioned on a side of the spinal column axis adjacent the opening.

Art Unit: 3732

Segment 20C is positioned in a proximal portion of the disc space adjacent the opening and segment 20A is positioned distally from the opening thereby bi-laterally supporting the vertebrae.

The step of actually creating an opening is considered inherent since a posterior lateral opening must exist in order to insert a cannula 60 as shown in Figs. 3, 9 and 10.

### ***Allowable Subject Matter***

Claims 39-45 are allowed.

Claims 52, 58-61, 65, 68, 70-72, 75-77, 79-82 and 85 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael B. Priddy whose telephone number is (703) 308-8620. The examiner can normally be reached on Mon.-Fri. 8 a.m. - 5 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Kevin Shaver can be reached on (703) 308-2582. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

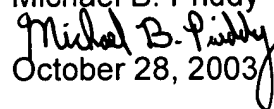
Application/Control Number: 09/694,521

Page 5

Art Unit: 3732

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1148.

Michael B. Priddy

  
October 28, 2003